

15122 *Muri* *SSJ*

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-196518.2

DATE: October 9, 1980

MATTER OF: A.R.&S. Enterprises, Inc.

DIGEST:

1. Agency's failure to give unsuccessful offeror advance notice of award as required by regulations is procedural deficiency not affecting validity of award since protester actually had adequate opportunity to and did file size status protest with SBA against proposed awardee and thus no prejudice resulted from such failure.
2. When procuring agency, acting on SBA Regional Office's determination that questioned bidder is small business, makes award, and contracting officer receives no notice of appeal before award, GAO has no basis to question propriety of agency's action.

A.R.&S. Enterprises, Inc. (A.R.&S.) protests the award of a contract to Commercial Maintenance, Inc. (CMI) under request for proposals (RFP) No. DABT11-79-R-0036, a small business set-aside, issued by Fort Gordon, Georgia (Army).

A.R.&S. contends that the contracting officer did not provide the pre-award notice required by Defense Acquisition Regulation (DAR) §§ 3-508.2(b) and 1-703(b) (1976 ed.) thus preventing any competitors from having an opportunity to file a small business size status protest against CMI. In support of its position, CMI cites in A & R Window Cleaning & Janitorial Service, Inc., B-197612, March 28, 1980, 80-1 CPD 231, where we said that termination of the contract would appear to be appropriate should the Small Business Administration rule that the awardee was not a small business because the contracting officer did not provide the required notice.

[Protest Against Agency's Actions]

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For the reasons stated below, we consider the award to CMI valid and deny A.R.&S.' protest.

The RFP was issued on June 29, 1979. CMI was selected as the proposed awardee, and in accordance with DAR §§ 1-703 (b)(1) and 3-508.2(b), which provides for notifying unsuccessful offerors of the identity of the proposed awardee and for providing such offerors time to protest the size status of the proposed awardee, pre-award notices were sent to all other offerors on October 11, 1979.

On October 19, 1979, A.R.&S. filed a protest against an award to CMI with this Office. A.R.&S. alleged that its offer and CMI's offer were substantially equal because, while CMI's price was 20 percent lower than that of A.R.&S., A.R.&S.' technical score was 20 percent higher and consequently, that award could not be made to CMI under the provision of the RFP. We sustained the protest because the RFP did not advise offerors of the importance of price in relation to technical factors and thus did not indicate the agency's intent to accept the lowest priced technically acceptable proposal, thereby prejudicing A.R.&S. We recommended that the RFP be revised to reflect the actual selection criteria and that offerors be permitted to submit revised proposals. A.R.&S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193.

In the meantime, on January 30, 1980, A.R.&S. filed with the contracting officer an untimely size status protest against CMI. On February 26, 1980, the SBA's Atlanta Regional Office issued its Findings & Decision, stating in pertinent part that " * * * CMI is a small business for the \$4.5 million size standard. Since the protest was untimely, this decision shall not affect CMI's eligibility for the above-cited procurement." A.R.&S. filed an appeal with the SBA Size Appeals Board on March 12, 1980, the same date as our decision on A.R.&S.' first bid protest.

On May 20, 1980, when A.R.&S. submitted its best and final offer pursuant to the action taken by the contracting officer in response to our decision, A.R.&S. also filed a second size status protest against CMI. Nine days later, the SBA Size Appeals Board summarily dismissed A.R.&S.' appeal from the decision on its first size status protest. Then, on May 30, 1980, the SBA Atlanta Regional Office issued its Findings & Decision on A.R.&S.' second size status protest finding as follows:

"Since SBA has explored the [allegation raised] by A.R.&S. in its recent decision on the same procurement, there exists no basis for conducting another size determination, and the protest is dismissed."

A.R.&S. appealed to the SBA Size Appeals Board on June 11, 1980.

On June 2, 1980, contract award was made to CMI without any further notice to offerors under DAR §§ 1-703 (b)(1) and 3-508.2(b). On June 13, 1980, A.R.&S. filed the instant protest with this Office.

The Army contends that A.R.&S. was not prejudiced by the contracting officer's failure to notify A.R.&S. for the second time that award was proposed to CMI since A.R.&S. had twice raised the issue of CMI's size and had received adverse decisions from SBA. The Army further argues that A.R.&S.' action in protesting CMI's size status for the second time when it submitted its best and final offer on May 20, 1980, obviated the need for a second notification to A.R.&S. of intent to award.

A.R.&S. asserts, however, that the Army's fails to recognize that the size status of a particular business concern is in a constant state of flux and that CMI's size status could have changed between October 1979 and May 1980. According to A.R.&S., the contracting officer's failure to abide by the regulation foreclosed any possibility for a new review of CMI's size status and the opportunity for such a review "would have been lost forever if A.R.&S. had not acted so wisely by filing a protest without waiting to see what the contracting officer would do." Accordingly, A.R.&S. argues that since it filed a timely appeal with the SBA Size Appeals Board in connection with the dismissal of its second size status protest, "its rights must be granted if it ultimately prevails" and "the Army should not be permitted to argue that SBA's decision does not apply to this procurement."

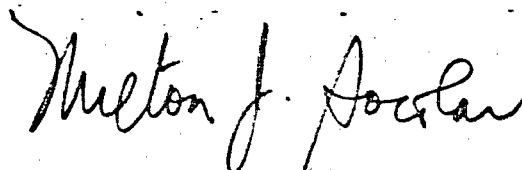
We have held that the failure to comply with a notice requirement such as that in DAR § 3-508.2(b) is a procedural deficiency not affecting the validity of an otherwise proper award unless a party can show it was prejudiced by the agency's failure to give the required notice. Meldick Services, Inc., B-194829, January 16, 1980, 80-1 CPD 48. Our decision in A & R Window Cleaning & Janitorial Service, Inc., supra, is not to

the contrary. In Meldick, the protester had been prevented from filing a size status protest with the SBA prior to award because of the lack of the required pre-award notice.

The situation before us is quite different. It is clear that A.R.&S. had a full opportunity to protest the size status of CMI in connection with this procurement and that it has suffered no prejudice because of the contracting officer's failure to give notice of intent to award for the second time. Certainly, by again protesting CMI's size status when it submitted its best and final offer, A.R.&S. obviated the need for a second notification to it of intent to award at least with respect to the opportunity such notice is to provide for protesting the awardee's size status. What would have transpired if A.R.&S. had not acted so expeditiously is purely speculative.

In addition, we note that DAR § 1-703(b)(1)(d.)(3) states that following notification by the SBA District Director of the small business status of a questioned bidder, award may be made on the basis of that determination. The determination is final unless (1) it is appealed and (2) the contracting officer is notified of the appeal before award. Southeastern Enterprises, Incorporated, B-195084, February 5, 1980, 80-1 CPD 90. We note that A.R.&S. did not appeal the dismissal of its second size status protest until more than a week after the contract to CMI was awarded. Although the SBA Appeals Board reversed the determination of the SBA Atlanta Regional Office on October 2, 1980, such reversal would not affect the propriety of the award even if additional notice of award had been furnished, since it was received considerably beyond the 30 day period provided by the regulation for suspension of contracting action. DAR § 1-703(b)(3)(iii) and (iv).

The protest is denied.



For the Comptroller General
of the United States